Supreme Court, U.S.
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No. 94-1088

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

DR. MICHAEL G. FORRESTER; MICHAELENE ANN JENKINS; DONNA E. NIEHOUSE; DENA A. NIEHOUSE; NANCY H. SCOFIELD; HAROLD E. SCOFIELD,
Petitioners,

vs.

CITY OF SAN DIEGO;
DONALD FASHING;
D. HANNAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DR. MICHAEL G. FORRESTER, et al., Plaintiffs, vs. THE CITY OF SAN DIEGO, et al., Defendants.	Civil Case No. 89-1051-CM **ORDER FOLLOWING MOTION HEARING**

Plaintiffs' motion for partial summary judgment and defendants' motion for partial summary judgment came on regularly for hearing by this court on July 9, 1991. Lloyd Tooks, Esq., appeared as counsel for plaintiffs and Francis Devaney, Esq., appeared for defendants.

BACKGROUND

Prior to April 8, 1989, the San Diego Police Chief and his top staff met to discuss the pro-life demonstration that they understood would take place at some location in the City of San Diego on April 8, 1989. It was anticipated that the demonstrators' conduct would include, but not necessarily be limited to, going into the premises of a building in which abortions were performed and blocking entrances to the building by sitting or standing in front of the entrances. At the meeting, the Police Chief made the decision, and established the policy, that any person who was arrested at the demonstration, and who did not voluntarily walk away from the premises of the building when ordered to do so by a police officer, would be removed by the application of varying amounts of pain. The process would require officers to use various methods of physical contact with a protestor's body such that the hold on the body would inflict pain in varying degrees. One technique also required the use of Nunchukas on wrists and ankles. These techniques are generically identified as "pain compliance" and when directed by management of the department

is called a "pain compliance policy". The policy also prohibited officers from physically dragging or carrying arrestees away from the premises.

The policy consisted of advising arrestees upon their arrests that force would be applied to them if they refused to comply with the arresting officers' orders to leave the premises. Arrestees were advised that the force exerted by the officers would be painful to them. They were also advised that they could avoid the pain by voluntarily complying with the officers' orders. The police department directed its officers to use pain compliance as a "force option" and exert only that amount of pressure necessary, on a case-by-case basis, to ensure compliance with the law by protestors. The determination of whether to use pain compliance on the arrestee, and the determination of how much force was to be exerted on the arrestee, were to be made at the scene of the arrest by the arresting officers, and were to be based on the degree of resistance offered by each individual arrestee.

DISCUSSION

In this case, plaintiffs and defendants each seek partial summary judgment on the single issue of whether the policy, established by San Diego Police Chief prior to April 8, 1989, that all persons who were arrested and refused to voluntarily walk away from the premises of the demonstration on April 8, 1989, could be subjected to pain compliance procedures was a Constitutional policy or not.

The Supreme Court decision in Graham v. Connor, 490 US 386 (1989), held that all excessive force claims against police officers should be analyzed under the Fourth Amendment and its reasonableness standard. The application of that standard requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Factors to be considered in the balancing include the severity of the crime in issue, whether the person to be arrested poses an immediate threat to the safety of the officers or others, whether the arrestee is

actively resisting arrest or attempting to evade arrest by flight, the degree of force used upon the person to be arrested, and the manner in which such force was applied.

In considering the reasonableness of the policy, the policy must first be analyzed as to what exactly it provided to the police officer. The policy provided that the technique of pain compliance included the use of a device known as Orcutt Police Nunchukas ("OPNs"), a force option that could be used by the arresting officer. Other force options that could have been used at the discretion of the arresting officer were: firm voice and firm grip, or no force at all to remove the arrestee. The arrestee made the decision as to what degree of force that the police officer used depending upon the degree of resistance.

Plaintiff asserts that the policy mandated the use of pain compliance. This was incorrect. The policy provided that pain compliance could be used as a force option to remove the arrestees if other measures of force/persuasion did not work.

In balancing the factors as stated in Graham, supra, this court holds that the policy is Constitutional. The first factor

is the severity of the crime. All the crimes were misdemeanors, but the officers were faced with over a hundred of them. The second is whether the arrestee posed an immediate threat to the safety of the officers or others. In this case, the large number of arrestees and the type of premises (cramped quarters) provided a threat to the safety of the officers and arrestees. It is noted that the pain compliance technique posed a probability of injury to the arrestees. The third factor is whether the arrestee is actively resisting arrest or attempting to evade arrest by flight. Here it was assumed from intelligence gathering sources that all resistees would passively resist. The last and most important factor from this court's standpoint is the degree of force used upon the person to be arrested and the manner in which it is applied.

Again, it is pointed out that this court is asked to review the policy promulgated by the Chief of Police and not the actual force used in each case.

The policy called for the degree of force to be used to directly relate to the arrestees' resistance. Plaintiffs assert that the policy mandated pain compliance techniques to be used in each

case. This court finds that the policy allowed the option of using pain compliance techniques but did not mandate the use of any specific degree of force. It was entirely within the discretion of the arresting officer as to what degree of force to use. In balancing all the factors previously cited in Graham, supra, this court finds that the policy as previously set out is Constitutional.

CONCLUSION

Having read and considered all the documents filed in support of, and in opposition to, both motions, and having heard and considered the oral arguments advanced by counsel at the hearing, and being fully advised as to all the relevant issues, the following orders are made:

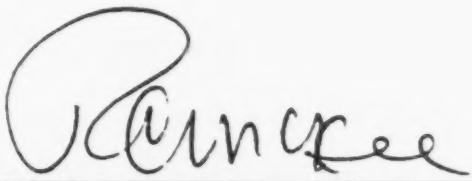
1. Plaintiffs' motion for partial summary judgment is DENIED.

2. Defendants' motion for partial summary judgment is GRANTED. The policy of the San Diego Police

Department before this court is Constitutional.

IT IS SO ORDERED.

Dated: August 12, 1991



ROGER CURTIS McKEE
UNITED STATES MAGISTRATE JUDGE